IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1963

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| FRED BERNARD DeGILLIO and MILTON SILVERMAN<br>Petitioners<br><br>vs<br><br>THE PEOPLE OF THE STATE OF MICHIGAN<br>Respondents | No 263 |

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

# BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION

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| FRED BERNARD DeGILLIO and MILTON SILVERMAN, Petitioners, vs. THE PEOPLE OF THE STATE OF MICHIGAN, Respondents. | No. 263 |

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# BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION

## Opinions Below

The ruling of the lower court on Petitioners' motion for a direct verdict or a new trial is printed in full as Respondent's Appendix A. (1c). Certain excerpts of this ruling are found in Petitioners' Appendix page 31b.

## Questions Presented

1. Were Petitioners' federal constitutional rights violated by the lower court's refusal to quash the Information

or remand for further examination where the petitioners based their demand for this relief on the examining magistrates refusal to adjourn for a second time the examination because the petitioners appeared without counsel, although they had retained counsel and knew that previous to the hearing that said counsel would not represent them because he was too busy handling other business.

2. Were the Petitioners denied due process of law by the admission into evidence of a record of a short conversation the prosecutor had with petitioners at the time of their arrest and before petitioners were allowed to contact their attorney?

3. Did the Information charge the petitioners with a crime under Michigan law and was the Information so vague and indefinite as to deny the petitioners due process of law?

## Statement of the Case

On January 18, 1961 Petitioners were arrested on a warrant charging them with obtaining property by false pretenses and conspiracy to obtain property under false pretenses (1b). On the day of their arrest the prosecuting attorney had a ten minute conversation with Petitioner DeGillio and a five minute conversation with Petitioner Silverman (4b). The purpose of this conversation was to learn the proper names of Petitioners, their addresses, ages, occupations, marital status, associates, places of business, whether they knew the complainant, and whether they had been arrested before or convicted of a crime (4b). Petitioner Silverman gave only his name and address (4b) and Petitioner DeGillio answered the prosecutors questions (7b). At the time of this conversation both Petitioners

knew of their rights to counsel and were advised they would be allowed to contact counsel (4b, 8b).

The Petitioners were arraigned on the warrant before a magistrate and by their counsel, a Mr. Goldfarb, they demanded an examination, and an examination was set for January 26, 1961 in compliance with the Michigan statute requiring the examination to be held within 10 days (6c). Two days before the examination their present attorney, Albert Goldfarb contacted the prosecuting attorney and requested a continuance. At the suggestion of Mr. Goldfarb, February 15, 1961 was agreed upon as the date for the examination (14b). The Municipal Judge approved and the subpoenas issued to a large number of witnesses were withdrawn and reissued for February 15, 1961.

The day before the date set for the examination, Petitioner Silverman appeared in the office of the prosecutor with a letter directed to the prosecuting attorney from Albert Goldfarb seeking another continuance (13b). At this time Petitioner Silverman was advised that witnesses had been subpoenaed and that it would be impossible to call the subpoenas off, and that, therefore, he should appear the following day in Municipal Court with an attorney ready to proceed with the examination (14b). Petitioner Silverman was also advised that if the Municipal Judge felt inclined to grant the continuance, the prosecutor would not object, however, the prosecutor would make clear to the Court the added expense and inconvenience that would result from such continuance.

On February 15, 1961 Petitioners appeared in Court for the examination without an attorney. Petitioner Silverman indicated by his statement at the examination that he had given the examining magistrate a copy of the letter Peti-

tioner had given the prosecuting attorney the previous day stating in effect that his attorney, Mr. Goldfarb, was busy in Detroit and desired a continuance (13b).

Petitioner Silverman advised the Court that he had spoken to the prosecuting attorney and that the prosecutor had stated in effect that he had no objection to the adjournment (13b). After this statement was made by Petitioner Silverman the following statements were made by the prosecutor and the judge:

> "Mr. Leonard: Secondly, Mr. Silverman is not correct when he says I told him today would be all right with me. My statement was that if the Judge agrees with that I would have no argument against it. However, I have issued or had subpoenas issued for these witnesses, they have been subpoenaed, and it would be difficult to call them off. Now, we have subpoenaed eight or ten witnesses, your Honor, and they are present in court and we are ready to proceed.
>
> "The Court: I think that there's one thing that's been overlooked here, too. In the first place, both respondents were represented by Mr. Goldberg and then substitution of attorneys was made and there was a request then for an adjournment and I wasn't going to adjourn the case then, I saw no reason for it; and the only reason it was adjourned last time was on the request of the Prosecuting Attorney that there be an adjournment. As I understand it, it was definitely understood that there would be no further adjournment, and that Mr. Goldfarb had his business in such a condition that he would be able to be here and represent him. If he didn't, that's too bad, as far as I am concerned. Counsel or no counsel, as far as I am

concerned, the case will proceed as scheduled."

The magistrate proceeded to hold the examination and bound the petitioners over for trial to the Circuit Court.

On the day set for arraignment in Circuit Court, February 20, 1961, Petitioners appeared with two attorneys and moved to quash the Information or remand the case for further examination. It was necessary for the Court to adjourn the matter for two weeks on the grounds that the People had not received the proper notice.

The Petitioners' reasons for asking to quash or remand were:

1. Because the alleged preliminary examination upon which certain information is based fails to disclose that the Defendants committed any crime.

2. Because at said alleged preliminary examination, the Defendants' rights were violated in a manner repugnant to their rights under the Constitution of the United States and of the Constitution of the State of Michigan, in that they were denied the right to be represented by counsel, in violation of Article VI of the United States Constitution and Article II, Section 19 of the Constitution of the State of Michigan.

3. Because the examining magistrate lacked jurisdiction and said proceedings were conducted in violation of Section 28.922 of the Michigan Statutes Annotated.

4. Without waiving the benefit of the foregoing Motion, Defendants in the alternative, request the Court to remand this cause to the examining magistrate for further hearing so that these Defendants might urge the grounds hereini-

before set forth as a basis for quashing the complaint and warrant. (19b)

At the appropriate time the motion was argued and on March 9, 1961 it was denied by the Circuit Judge. The lower Court found specifically:

1. That sufficient evidence appeared in the transcript taken at the examination to warrant Petitioners being bound over to Circuit Court.

2. That Petitioners had waived the ten days provision of the statute and requested an adjournment on January 23, 1963.

3. That Petitioners did have counsel and counsel failed to appear.

4. That representation by counsel on examination is permissible not mandatory and in the alternative if representation is mandatory then it is not a right to a specific attorney if such an attorney is too busy to handle his clients affairs. (24b).

The case proceeded to trial and at the trial the stenographic records of the conversation between the prosecutor and petitioners on January 18, 1961 were introduced into evidence over the objections of the Petitioners' attorney. The Court directed a verdict of not guilty on Count 1, obtaining property by false pretenses, and the jury found Petitioners guilty of conspiracy to obtain property by false pretenses.

The Petitioners moved for a new trial raising the issues covered by the Motion to Quash and alleging also that the

Judge should have instructed the jury to not consider the statements made by both Petitioners at the time of their arrest (29b).

The trial judge denied the motion for a new trial stating that with regard to the statements of the two Petitioners, the Court found that the statements contained no evidence of anything either of guilt or innocence, and that there was plenty of evidence of the Petitioners agreeing to accomplish a lawful purpose by unlawful means, and that none of the matters complained of resulted in a miscarriage of justice. The Judge added further, that if any irregularities do exist they were so unimportant that it would not warrant granting a new trial (1c).

Petitioners applied for a leave to appeal in the Michigan Supreme Court. This was denied on September 27, 1961 (33b). Petitioners petitioned to the United States Supreme Court for a writ of certiorari to the United States Supreme Court. This was denied on January 22, 1962 (35b).

The Petitioners then proceeded to file another motion for a new trial and this was denied on December 12, 1962 (36b). Petitioners applied for a leave to appeal the decision to the Michigan Supreme Court and this was denied on April 10, 1963 (37b). The Petitioners have now petitioned a second time to the U. S. Supreme Court for a writ of certiorari to the Michigan Supreme Court.

## ARGUMENT

### I

### PETITIONERS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE LOWER COURT'S REFUSAL TO QUASH THE INFORMATION OR REMAND FOR FURTHER EXAMINATION.

Under Michigan procedure in criminal cases, the examining magistrate has no authority to adjourn an examination unless in his discretion it shall clearly appear by sufficient showing that the reasons for the adjournment are founded upon strict necessity and that the examination cannot be had or a manifest injustice will be done. CL 1948, 766.7; MSA 28.925 (7c).

This procedure is clearly designed to frustrate attempts by both the prosecutor and the defendant to prolong proceedings so that justice cannot be done.

The examination under the statute must be made promptly. The statute specifically provides that the magistrate before whom a person is brought on a charge not cognizable by the justice of the peace shall set a day for examination not exceeding ten days thereafter. CL 1948 766.4; MSA 28.922 (6c).

The reasons stated by Petitioners for quashing the Information were that the examination failed to disclose Petitioners had committed any crime and that Petitioners were denied the right to be represented by counsel and that the magistrate had no jurisdiction under MSA 28.922 (19b).

With regard to the question of loss of jurisdiction, the

Petitioners requested the adjournment of the examination set for January 26, and it was granted. The trial judge held this to be a waiver of the ten day rule (24b). In view of the proceedings since that day, it is clear that Petitioners would have claimed that their constitutional rights would have been violated if the judge had not granted the adjournment. So on this point the Petitioners appear to say that it would be an error to grant the adjournment and it would be an error for the judge not to grant the adjournment. This point was clearly frivolous.

With regard to the question of whether the examination failed to disclose that Petitioners committed any crime, it must be noted first that the purpose of the examination, to be more specific, is to decide whether a crime has been committed and whether there is probable cause shown by competent evidence to believe the Petitioners guilt thereof. *Gaffney v. Circuit Judge*, 85 Mich. 138.

In this case a transcript of the case was available (24b). The judge read the transcript and held that evidence introduced established that a crime had been committed and there was probable cause shown to believe Petitioners guilty thereof.

The Petitioners did not allege nor did they maintain that any incompetent or inadmissible evidence was introduced at the examination, and they could have determined this simply by reading the transcript. So, except for the question of counsel, they did not allege that anything irregular occurred during the examination. The one question they raised was one of law, viz., accepting as competent all testimony introduced, did the examination establish that a crime was committed and that there was probable cause to believe the Petitioners guilty thereof? The Circuit Judge

held that it did and the Circuit Court's position was sustained twice by the Michigan Supreme Court. This should conclusively settle this issue.

With regard to the question of counsel in view of the Michigan statutes providing for the adjournment of an examination, the question is did the decision of the examining magistrate not to adjourn the hearing result in a manifest injustice. The Petitioners make no attempt to show that a manifest injustice occurred. They seem to hold blindly to a proposition that an examination, or for that matter any criminal proceedings, cannot proceed under any circumstances if the Petitioners do not have their attorney present. This is the position taken by the Petitioners on their motion to quash. They did not allege or show that error occurred or injustice resulted because Petitioners failed to make ararngements for counsel or that they were denied the right to obtain counsel. They did not allege any fact which would sustain a finding that a manifest injustice occurred, they stated only that their attorney was too busy somewhere else.

Petitioners' point is clearly without merit. The examining magistrate acted reasonably, allowed one adjournment beyond the statutory ten days. At that time subpoenas had to be withdrawn and new subpoenas were issued for the day Petitioners agreed upon for the examination. Then Petitioners' attorney did not even bother to file a motion or appear before the Court. The day before the examination the Petitioners simply advised the Court that their attorney was too busy to represent them. This maneuver by Petitioners and their attorney was no more than an attempt to dictate terms to the Court on a take it or leave it basis and was clearly contrary to the express terms of the statute.

It must be observed also that under Michigan law the rights of a defendant are not waived at the examination. A defendant is at liberty to attack the information or to challenge the competency of evidence introduced at the examination at any time until he enters his plea upon arraignment on the Information in Circuit Court. In the present case the Petitioners, represented by two attorneys, moved to quash or remand before a plea was entered. This was proper procedure. All Petitioners were required to do then was to show that a manifest injustice occurred or that other good reasons existed for further examination. This they did not do and to the contrary they accepted the examination proofs and merely asked the Court whether as a matter of law it was sufficient to sustain the Information. The Court held it did.

In view of a complete failure on the part of Petitioners to show a manifest injustice, the Circuit Judge necessarily found that the examining magistrate did not abuse his discretion. Since it is well settled that absent abuse of discretion by the magistrate, the Court will not review matters pertaining to a continuance or an adjournment Petitioners' point is clearly without merit: *Isaacs v. United States*, 159 U.S. 487, p. 489 and *Avery v. Alabama*, 308 U.S. 444, p. 446.

A total lack of merit is indicated also by the fact that the Petitioners do not cite one case which will support their position. Both Petitioners were, in the words of their own attorney, sharp business men (11c). They knew of their rights to counsel as demonstrated by virtually their first words to the prosecutor when they were arrested (4b). They were represented by an attorney on their arraignment on the warrant and they arranged for another attorney, Mr. Goldfarb. This attorney, two days before the

original time set for the examination, asked for an adjournment. This was granted. Then both Petitioners and their attorney obviously decided that petitioners would appear without counsel and try to force another adjournment. This was their decision to make. They made the decision and they have clearly no basis for claiming that the People of the State of Michigan violated their constitutional rights.

## II

## THE PETITIONERS WERE NOT DENIED DUE PROCESS OF LAW BY THE ADMISSION INTO EVIDENCE OF PETITIONERS' VOLUNTARY STATEMENTS MADE AT THE TIME OF THEIR ARREST.

The Michigan statutes provide that no verdict shall be set aside or reversed or a new trial be granted on the ground of misdirection of the jury, or the improper admission or rejection of evidence, unless after an examination of this entire cause it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. CL 1948 §769.26, MSA §28.1096 (5c).

The statements made by both Petitioners were voluntary. They were made with full knowledge of their right not to answer questions and their right to counsel. The conversation continued for five minutes in one case, and ten minutes in the other. In view of this fact, to the extent that the conversations contained admissions relevant to the issues, they clearly were admissible. The trial judge on the motion for a new trial, however, was not called upon under Michigan procedure to determine the technical question of relevancy. Under the statute cited above the judge is required to examine the entire cause and grant the motion only if

it affirmatively appears that a miscarriage of justice resulted. The judge found that there was plenty of evidence independent of these statements establishing the guilt of Petitioners, and if the admission of these statements was in any way irregular it did not result in a miscarriage of justice. (4c)

It must be noted that the Petitioners have made no attempt to distinguish between the statement of Petitioner Silverman and the statement of Petitioner DeGillio and insisted upon an instruction that both be disregarded (29b). With regard to the statement of DeGillio, this statement dealt with his employment and membership in a certain union. This would appear to be relevant and material and therefore admissible. Since Michigan law requires that the entire statement of the person be admitted, *People v. Hepner*, 285 Mich 640, the prosecutor had to offer the statement, even though the Petitioners' answers to questions concerning previous arrests were more favorable to the defense than to the People. The only possible irregularity, therefore, was the consideration of the jury of the statement made by Petitioner Silverman. Considering, however, the fact that the trial judge found that plenty of evidence was introduced to establish Petitioner's guilt (2c), the admission of this brief statement consisting of no more than a refusal to answer a few questions clearly did not result in a miscarriage of justice.

The cases cited by Petitioners on this issue are not in point. There was no evidence introduced of any previous conviction and there was no repeated and persistent introduction of evidence reflecting in any way on the possibility of previous convictions. There was no error of any kind which affected the substantial right of Petitioners.

## III

## THE INFORMATION IN CLEAR AND DEFINITE TERMS CHARGED THE PETITIONERS WITH A CRIME UNDER MICHIGAN LAW.

Sixty years ago in the case of *People v. Butler*, 111 Mich. 483, the Michigan Supreme Court considered the validity of an Information almost identical to the one in this case. The following excerpt from this case is pertinent:

> "MOORE, J. The respondent was convicted in the recorder's court, and appeals to this court. The information filed in this case reads as follows:
>
> 'That Daniel M. Butler and William H. Bird, late of said city of Detroit, heretofore, to wit, on the 1st day of May, in A.D. 1895, at the said city of Detroit, in the county aforesaid, unlawfully, falsely, deceitfully, and fraudulently did combine, conspire, confederate, and agree together, by divers false pretenses, subtle means, and devices, to attain and acquire unto themselves, of and from the county of Wayne, a sum of money, to wit, the sum of fifty dollars, of the value of fifty dollars, of the money of it, the said county of Wayne, and to cheat and defraud it, the said county of Wayne, thereof, to the great damage of it, the said county of Wayne.'
>
> "It is the claim of the respondent that this information should have been quashed,—*First*, because it states no offense known to the law; *second*, because it contains no allegations of the means by which respondents conspired to cheat and defraud. The claim of the

respondent cannot be sustained. The case is ruled by *People v. Richards*, 1 Mich. 216 (51 Am. Dec. 75); *People v. Clark*, 10 Mich. 310; *People v. Winslow*, 39 Mich. 505; *People v. Petheram*, 64 Mich. 252; *People v. Watson*, 75 Mich. 582; *People v. Dyer*, 79 Mich. 480".

This case and seven other Michigan cases were cited by the trial judge in support of his holding that the information was valid (2c). These cases are not mentioned in Petitioners' brief. However, Petitioners do cite *Alderman v. People*, 4 Mich. 414. The indictment in this case was defective because in the words of the Court "there (was) * * * no allegation whatsoever that in obtaining the goods, any false pretenses, * * * was to be used." The distinction between this case and the present case is obvious.

The information in the *Barkelow* case, 37 Mich. 455, which is relied on by the Petitioners was defective because it alleged that cheating and defrauding were to be done by unlawful, illegal, dishonest, corrupt, and indirect means and devices. The Court stated that all of these may fall outside of any legal definition of a crime. The Court also found the information ambiguous for other reasons.

Petitioners also cited *Parr v. United States*, 362 U.S. 370 and *Russel v. United States*, 369 U.S. 749. In the *Parr* case the Court found that the act complained of was no violation of the federal law and, therefore, conspiracy to do that act would not violate the federal law. The *Russel* case also concerned federal law and the Court held that where the statute makes it a violation of the law not to answer questions pertinent to the subject of inquiry, the defendant must be advised as to what the subject of the inquiry is so that he can defend himself. These cases clearly do not support the position taken by the Petitioners.

In view of *People v. Butler*, supra, and the cases cited by the trial judge, Petitioners' assertion that the information is unconstitutional, vague and indefinite is patently without foundation.

## CONCLUSION

It is respectfully submitted that for the reasons stated above the petition for certiorari should be denied. There are no special and important reasons for reviewing by a writ of certiorari the Michigan Supreme Court decision in this case. Petitioners raise no federal questions of substance not previously determined by the United States Supreme Court and the decision of the Michigan Supreme Court is clearly correct.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

## LOWER COURT'S RULING ON PETITIONERS MOTION FOR NEW TRIAL

**STATE OF MICHIGAN**

**IN THE CIRCUIT COURT OF THE COUNTY OF GENESEE**

| | |
|---|---|
| **THE PEOPLE OF THE STATE OF MICHIGAN**<br>**vs.**<br>**FRED B. DEGILLIO and MILTON SILVERMAN,**<br>**Defendants** | |

Proceedings had in the above titled cause before DONN D. PARKER, Circuit Judge, Genesee County Courthouse, Flint, Michigan, on July 18, 1961.

* * * * *

THE COURT: The motion that's pending, as I understand it, is divided into two parts. First, that the, what counsel has called that the judgment of conviction be arrested, and which I understand to really be in effect, a motion that the Court direct a verdict of not guilty. That's what it is in substance, isn't it, sir?

MR. RUBIN: Yes, your Honor.

THE COURT: And also that, in the alternative, the Court grant a new trial.

The Court will decline to direct a verdict of not guilty on Count 2, affirming its pretrial ruling that the crime was stated in the information and reiterating its belief that there was sufficient evidence produced on behalf of the People.

In discussing the claims and reasons given for a new trial, the Court will discuss them in the order they are presented in the defendant's motion, starting with 1(a). Counsel addresses this objection to the form in which the verdict was delivered by the jury. Although the foreman fumbled a little bit with his words, it was clear and convincing to the Court what he intended to express, and the jurors so indicated, and that was clearly not guilty as to Count 1 and guilty on Count 2, the conspiracy count.

On 1(b) where the defense alleges there is no crime charged in Count 2, this has been ruled on heretofore and I think repetition is unnecessary. There are certain authorities I should put in this: *People v. Heath*, 277 Mich 473; *People v. Butler*, 111 Mich 483; *People v. Clark*, 10 Mich 310; *People v. Summers*, 115 Mich 537; *People v. Norwood*, 312 Mich 266; *People v. Petheram*, 64 Mich 252; and *People v. Gilman*, 121 Mich 187.

Reason 2(a) which, in substance, is that of insufficiency of evidence, and the Court will say that it disagrees with this assertion; that I think the Court stated in its charge specifically that the plans to occupy a dwelling in the future were not existing facts and should be disregarded by the jury, however, the representations regarding the purchaser's job and his ability to pay and the legal effect of papers supposedly releasing the sellers from this mortgage and note liability were, under the circumstances, clearly representations of fact. And the Court might add that a review of DeGillio's testimony, alone, under cross examina-

tion, should lay at rest for all time any argument as to the sufficiency of the evidence.

3. Well, the Court just disagrees with defense counsel on the law on number 3, and will refer both counsel to the cases I previously cited.

4, which has to do with the statements of the two respondents which were admitted into evidence; the true situation here is, I think, that the statements and their contents contained no evidence of anything, either guilt or innocence, and the Court feels it gave an adequate instruction regarding their effect.

5. (a) and (b): This matter was ruled on before trial and it was presented to the Supreme Court and in an application for leave to appeal, and this Court has not changed its position on those matters.

6, which is my failure to give the charge requested by the defendants, this is very similar to 4—I guess it is. I can't see how the defense was prejudiced here. I'll say the same thing I said on number 4, and that is that the statements, so-called, were really evidence of nothing. My memory is that all that was in them was the name and address and very little more, and at most they were surplusage, and the Court still thinks the instruction that he gave regarding them was the proper law in Michigan and I cannot find that it prejudiced the defendants in any way.

7(a) and (b): Prejudicial arguments of counsel, particularly the prosecutor. I can't feel that that argument transgressed the boundaries of proper argument. Both counsel were fairly windy in this matter and rambled far afield. I think it was about par for both.

8; venue. Venue in a conspiracy is where any overt act takes place; *People v. Pettijohn*, 283 Mich 108, *People v. Ranney*, 304 Mich 315, *People v. Arnold*, 46 Mich 268.

In general, the Court will say it thought there was plenty of evidence of the defendants agreeing to accomplish a lawful purpose by unlawful means, and that none of the matters complained of resulted in a miscarriage of justice, and that if any irregularities do exist in the proceedings, they are so unimportant they would not warrant the granting of a new trial. Accordingly, defendants' motions are denied.

## APPENDIX "B"

## STATUTES INVOLVED

Michigan Code of Criminal Procedure, Chapter IX, Judgment and Sentence

Sec. 26. No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. (C.L. '48, §769.26; C.L. '29, §17354.)

Michigan Code of Criminal Procedures, Chapter VI, Examination of Offenders

Section 1. The state and accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination. (C.L. '48, §766.1; C.L. '29, §17193.)

Sec. 2. Whenever complaint shall be made to any magistrate named in section one [1], chapter four [4], of this act, that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him. (C.L. '48, §766.2; C.L. '29, §17194.)

Sec. 3. If it shall appear from such examination that any criminal offense not cognizable by a justice of the peace has been committed, the magistrate shall issue a warrant directed to the sheriff, chief of police, constable or any peace officer of the county, reciting the substance of the accusation and commanding him forthwith to take the person accused of having committed such offense and to bring him before such magistrate to be dealt with according to law, and in the same warrant may require such officer to summon such witnesses as shall be named therein. (C.L. '48, §766.3; C.L. '29, §17195.)

Sec. 4. The magistrate before whom any person is brought on a charge of having committed an offense not cognizable by a justice of the peace, shall set a day for examination not exceeding ten [10] days thereafter, at which time he shall examine the complainant and the witnesses in support of the prosecution, on oath in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such magistrate may deem pertinent. (C.L. '48, §766.4; C.L. '29, §17196.)

Sec. 5. If it shall appear that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail be offered, or the offense be not bailable by the magistrate, the prisoner shall be committed to jail for trial. (C.L. '48, §766.5; C.L. '29, §17197.)

Sec. 6. Any magistrate to whom complaint is made, or before whom any prisoner is brought, may associate with himself one or more other magistrates of the same county,

and they may together execute the powers and duties conferred upon such magistrates respectively by this chapter, but no fees shall be taxed for such associates. (C.L. '48, §766.6; C.L. '29, §17198.)

Sec. 7. Any magistrate may adjourn an examination for an offense not cognizable by him if the same be necessary, to the same or a different place in the county as such magistrate shall deem necessary; and in such case the accused may in the meantime be committed either to the county jail or to the custody of the officer by whom he was arrested or to any other officer; or, unless he shall be charged with treason or murder, he may be recognized in a sum and with sureties to the satisfaction of the magistrate, for his appearance before such magistrate for further examination: Provided, That no adjournments, continuances or delays of such examination shall be granted by such magistrate except for good cause shown: And provided further, That no magistrate shall adjourn, continue or delay the examination of any cause by the consent of the prosecution and accused unless in his discretion it shall clearly appear by a sufficient showing to said magistrate to be entered upon the record that the reasons for such consent are founded upon strict necessity and that the examination of said cause cannot then be had, or a manifest injustice will be done. No action on the part of the magistrate in adjourning or continuing any case, shall cause said magistrate to lose jurisdiction of said case. (C.L. '48, §766.7; C.L. '29, §17199.)

Sec. 8. The person accused may be committed as provided in the preceding section by the verbal order of the magistrate, or by a warrant under his hand, stating that he is committed for such further examination on a day to be named in the warrant; and on the day therein specified, he may be brought before the magistrate by his verbal

order to the same officer by or to whose custody he was committed, or by an order in writing to a different officer. (C.L. '48, §766.8; C.L. '29, §17200.)

Sec. 9. On the preliminary examination of every person charged with the offense of rape, assault with intent to commit rape, seduction, adultery, bastardy or other offense against chastity, morality or decency, it shall be in the discretion of the examining magistrate to exclude from the place where such examination is held, any or all persons not officers of the court, or persons by law required to be in attendance. (C.L. '48, §766.9; C.L. '29, §17201.)

Sec. 10. The magistrate while conducting such examination may exclude from the place of the examination all the witnesses who have not been examined; and he may also, if requested or if he sees cause, direct the witnesses whether for or against the prisoner, to be kept separate so that they cannot converse with each other until they shall have been examined. And such magistrate may in his discretion, also exclude from the place of examination any or all minors during the examination of such witnesses. (C.L. '48, §766.10; C.L. '29, §17202.)

Sec. 11. Witnesses may be compelled to appear before such magistrate by subpoenas issued by him, or by any officer or court authorized to issue subpoenas, in the same manner and with the like effect and subject to the same penalties for disobedience, or for refusing to be sworn or to testify, as in cases of trials before justices of the peace; and the evidence given by the witnesses examined shall be reduced to writing by such magistrate, or under his direction and shall be signed by the witnesses respectively: Provided, That, unless otherwise provided by law, the evidence so given shall be taken down in shorthand by a county stenographer where one has been appointed

under the provision of any local act of the legislature or by the board of supervisors of the county wherein such examination is held, or the magistrate for cause shown may appoint some other suitable stenographer at the request of the prosecuting attorney of said county with the consent of the respondent or his attorney to act as official stenographer pro tem. for the court of such magistrate to take down in shorthand the testimony of any such examination, and any stenographer so appointed shall take the constitutional oath as such official stenographer and shall be entitled to the following fees: $6.00 for each day and $3.00 for each half day while so employed in taking down such testimony and 10 cents per folio for typewriting such testimony so taken down in shorthand, or such other compensation and fees as shall be fixed by the board of supervisors appointing such stenographer, and the same may be allowed and paid out of the treasury of the county in which such testimony is taken: Provided further, That it shall not be necessary for a witness or witnesses whose testimony is taken in shorthand by such stenographer above provided, to sign such testimony, but any witness or witnesses shall have the right to have such testimony read to them upon their request. Such testimony, after being typewritten, shall be received and filed in the court to which the accused is held for trial without the signature of such witness or witnesses for the same purpose and with like effect as the testimony of witnesses hereinabove provided, which is signed by such witness or witnesses and such testimony so taken shall be considered prima facie evidence of the testimony of such witness or witnesses at such examination. (C.L. '48, 7766.11; C.L. '29, 17203.)

Sec. 12. After the testimony in support of the prosecution has been given, the witnesses for the prisoner, if he have any, shall be sworn, examined, and cross-examined

and he may be assisted by counsel in such examination and in the cross-examination of the witnesses in support of the prosecution. (C.L. '48, §766.12; C.L. '29, §17204.)

Sec. 13. If it shall appear to the magistrate upon the examination of the whole matter, either that no offense has been committed or that there is not probable cause for charging the defendant therewith; he shall discharge such defendant. If it shall appear to the magistrate upon the examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith, said magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial. (C.L. '48, §766.13; C.L. '29, §17205.)

## APPENDIX "C"

## EXCERPTS FROM PETITIONERS CLOSING ARGUMENT

(Numbers in parentheses ( ) refer to pages of transcript)

(38) (Mr. Rubin)

They are business men, they buy and sell; good, bad, sharp, maybe. I must comment on that for a minute. Every business man is sharp. Did you ever walk into a business store when they are trying to sell you something on credit? The pressure is there. Better than that, when I go into a barber shop and all I want is a shave, they really pressure me in for a tonic, hair cut and a massage, and they really con me into it. Of course that's business.

In this instance when these people ran after them, "how much will you give me so I can get out," of course there was no pressure when these people vacate a house and walk in and try to buy the equity—just the equity—and they say, "No, I'll bargain," they walk out, don't pay. The seller gets a little nervous, drops his price; pressure, that's business. Of course I might tell you what a beautiful wife that hasn't nothing to do with it—"I'm a Teamster, work in the Teamsters," and try to pressure you and make a deal, what's wrong with that? I might tell you I'll assume your mortgage and you say, "are you sure, Rubin?" and you say, "Yes, sir, yes, man," and I don't, all of that is what we call puffing up business pressure, call it a little chicanery if you will, I don't (39) kid anybody in our modern business world, it's business.